NO. 49381-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

TERI MICHAEL TALBOT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01851-5

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Talbot was convicted of Attempted Child Molestation in the Second Degree after he showed up to meet a police officer posing as a mother looking for a man to have sex with her 12-year-old daughter. In a sting operation, Vancouver Police officers posted an advertisement on craigslist entitled "Discreet Mom and dau looking for tutor – w4m (Vancouver)." CP 140, 145. The body of the advertisement read: "Single Mom looking for discreet friend for daughter. No role playing, hopeful for someone kind and gentle she can learn from." CP 145. This advertisement was flagged and removed from Craigslist 41 minutes after it had been posted on September 18, 2015. CP 140-41.

At approximately 32 minutes after the advertisement was posted, Talbot responded to the advertisement sending an email via Craigslist to Detective Robert Givens in his undercover role as the mother, Ellie

O'Reilly. CP 141. In the email Talbot stated, "Hi I saw your post is this for real if so I would love to teach her anything she wants." CP 147. In a second email Talbot sent he told Det. Givens (as the mother) that he was "very gentle and not in a hurry." Talbot said he was "older and can take [his] time with her and can maybe help her in other ways. $." CP 147. A few days later on September 21, 2015 the email conversation between Talbot and Det. Givens continued. In the role of the mother, "Ellie," Det. Givens told Talbot her daughter was "very young" and also that she "will be 13 in December...." CP 148. Talbot suggested they meet in person to discuss the details. *Id.* When "Ellie" responded that she wanted to get to know him better before meeting, Talbot responded that he understood, but that also "I could get in trouble for this. So I have to protect myself to. [*sic*]." CP 150. In describing his idea for having sexual contact with "Ellie's" daughter, Talbot stated, "Now it would be for pleasure and that starts with tenderness no hurrying anything take your time enjoy the feeling." *Id.*

The following day, the conversation between Talbot and "Ellie" moved to text messages. CP 156-57. When "Ellie" asked Talbot to tell her his plan for giving her daughter a good experience, Talbot responded, "I really don't want to say anything on hear [*sic*] I would rather speak in private. If someone else saw the we both would be in big trouble so I want

to meet and talk." CP 157. When asked about "protection," Talbot assured "Ellie" he was "fixed years ago" and that he could not make "baby's [*sic*] anymore." CP 158. Talbot also showed he understood that "Ellie" wanted him to have sex with her daughter when he said, "...want me to have a sex with your 13 year old...." CP 158. He also showed his intent to go through with the act when he said, "I will do this but I want to meet you first." CP 158. The text messages then showed that Talbot intended to meet "Ellie" and talk and then follow her back to her apartment and "start lessons" with her daughter that evening. CP 159.

Vancouver Police Investigator Maggi Holbrook then posed as "Ellie" in a telephone call with Talbot. RP 217-19; CP 103. During the phone call they discussed meeting at a Starbucks and about the plans for Talbot molesting her daughter. CP 181, 201-18. During the call, Talbot referred to having sex with a child as "every guy's ultimate fantasy." CP 166. In discussing specifics of what Talbot intended to do with "Ellie's" daughter, Talbot said the "first time would be sit and touch, talk and touch and ask questions and feel and explain things..." as if he went fast and a guy were to "just stick his thing in there and start pumpin' away" it would "hurt her if it was her first initial thing." CP 168.

After the phone conversation during which Talbot and "Ellie" agreed to meet at Starbucks, Talbot drove his car to the agreed-upon

Starbucks, parked his car and entered the Starbucks. CP 103-04. Det. Givens approached Talbot and placed him under arrest. When Det. Givens told Talbot he knew why he was being arrested, Talbot responded, "I know I'm being set up." CP 104. Post-*Miranda*, Talbot admitted he was the person who had been communicating with "Ellie" by email, text messaging and on the phone. CP 104.

In finding Talbot guilty of Attempted Child Molestation in the Second Degree the trial court found that Talbot took a substantial step toward the commission of the crime by driving to and entering into the Starbucks pursuant to his agreement with "Ellie." CP 104.

ARGUMENT

I. Sufficient evidence supports Talbot's conviction for Attempted Child Molestation in the Second Degree.

Talbot argues the State did not present sufficient evidence to support his conviction for Attempted Child Molestation in the Second Degree because there was insufficient evidence of his intent to commit the crime of child molestation and insufficient evidence that he took a substantial step towards the commission of the crime. The evidence presented at trial overwhelmingly proved Talbot's guilt. His conviction should be affirmed.

To determine whether sufficient evidence supports a conviction, this Court determines whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt based on the evidence presented at trial. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When a defendant challenges the sufficiency of the evidence, this Court views all the evidence in the light most favorable to the State, and draws all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977); *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). This Court also defers to the trier of fact on any issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). Credibility determinations are not subject to review on appeal. *Thomas*, 150 Wn.2d at 874. Further, [i]t makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt." *State v. Wilson*, 158 Wn. App. 305, 316-17, 242 P.3d 19 (2010) (citing *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)).

In this case, the State charged Talbot with Attempted Child Molestation in the Second Degree, alleging Talbot took a substantial step towards the commission of the crime of child molestation in the second degree, with the intent to commit that crime. CP 63-64; RCW 9A.28.020(1); RCW 9A.44.086. A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation. *State v. Aumick*, 126 Wn.2d 422, 427, 894 P.2d 1325 (1995).

Talbot's argument on appeal focuses on whether the evidence sufficiently supports his intent to commit the crime of child molestation and whether his conduct crossed the line from mere preparation and qualified as a "substantial step." *See* Br. of Appellant, p. 15. Preparation for a criminal act is not sufficient to satisfy the requirement of a "substantial step" in a prosecution for attempt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002) (citing *State v. Workman*, 90 Wn.2d 443, 449-50, 584 P.2d 382 (1978)). A substantial step is conduct that is "strongly corroborative of the defendant's criminal purpose." *Workman*, 90 Wn.2d at 451 (quoting Model Penal Code sec. 5.01(1)(c) (Proposed Official Draft, 1962)). The determination of whether a defendant's conduct constitutes a "substantial step" towards the commission of the crime is a question of fact for the trier of fact to decide. *Id.* at 449. Importantly, any act done in furtherance of the crime constitutes an

attempt if it clearly shows the design of the defendant to commit the crime." *Wilson*, at 317 (citing *State v. Nicholson*, 77 Wn.2d 415, 420, 463 P.2d 633 (1969)).

Talbot relies upon *State v. Sivins,* 138 Wn.App. 52, 155 P.3d 982 (2007) to support his argument that the evidence was not sufficient to support his conviction for attempted child molestation in the second degree. However, in *Sivins* the Court also addressed the very argument that Talbot makes in this appeal: that he still had an "out" and therefore was not committed to or intending to commit the crime. Talbot argues that as the parties agreed to make sure they were "ok" with everything before having the defendant meet the child that he did not have the intent to commit child molestation. In *Sivins*, the defendant also argued that as he told the intended victim that the sexual intercourse was "contingent upon getting to know each other," that though the defendant may have eventually had the intent to commit the crime, he didn't at the time of the act. *Sivins*, 138 Wn.App. at 64. The *Sivins* Court rejected this argument. The court relied upon jurisprudence holding that "[a]ny slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime." *Id.* (quoting *State v. Price*, 103 Wn.App. 845, 852, 14 P.3d 841 (2000)). This shows that a *slight* act, in

furtherance of the commission of child molestation, can be sufficient to constitute a substantial step towards the commission of that crime.

Talbot also relies heavily upon *State v. Wilson,* 158 Wn.App. 305, 242 P.3d 19 (2010) to support his argument that the evidence presented at his trial was insufficient to support his conviction. In *Wilson*, the defendant argued there was insufficient evidence to support his conviction for attempted child rape because despite his communications showing his plan to meet a child at a particular location and give her money in exchange for sex that he only drove to a public location, never left his vehicle, and never handed over any money. *Wilson*, 158 Wn.App. at 316. Specifically, Wilson argued this showed he was still in the preparation stage of the crime. *Id.* On appeal the Court rejected Wilson's argument and found that his communications showed his intent to have sexual intercourse with a 13-year-old child, and his presence at the pre-arranged location and possession of $300 cash was sufficient to show a substantial step towards the commission of the crime. *Id.* at 318. The Court rejected Wilson's argument that he was still in the negotiation stage of the transaction. *Id.* at 318-19. Talbot showed up at the pre-arranged location to meet a woman with the intent to go back to her residence and have sexual contact with her 12-year-old daughter. Talbot was not in the negotiation

stage and clearly took a substantial step towards the commission of the crime of child molestation.

Talbot further argues that engaging in negotiations with an undercover officer to commit a crime is not a "substantial step." Br. of Appellant, p. 20 (citing to *State v. Grundy*, 76 Wn. App. 335, 886 P.2d 208 (1994)). In *Grundy,* an undercover officer posed as a drug dealer and approached the defendant, and asked what he wanted. *Grundy* 76 Wn.App. at 336. The defendant said he wanted a "20." The officer asked of what and the defendant said "20 of coke." *Id.* The officer asked to see the money, but Grundy first asked to see the drugs. *Id.* Grundy was then arrested and convicted of attempted PCS – cocaine. *Id.* His conviction was reversed on insufficient evidence because Grundy's words, "without more" were insufficient "to constitute the requisite overt act." *Id.* at 337. The appellate court also noted that the parties were still in the "negotiating stage" when Grundy was arrested. *Id.* at 338. However, in Talbot's case, the evidence established that Talbot took actions that strongly corroborated his intent to commit the crime of child molestation.

Despite Talbot's attempt to show that he was simply strung along and roped into this situation by the police, the evidence clearly showed he sought out the contact, continued with the contact, and made significant sexual references and details about his plan to molest a young child.

Talbot fails to address significant facts that were presented at trial, and found to be true by the trier of fact that show he clearly intended to commit the crime of child molestation in the second degree and that he took a substantial step towards the commission of that crime. He acknowledged that he understood the woman was looking for a man to "have sex" with her 12 year-old daughter. He discussed that there was no need for "protection" as he was "fixed," could not have children, and was clean. CP 156-59. He also made graphic statements about how he would go about initiating this young child into sex, discussing his desire not to make her "raw" and "bow-legged" after a vicious rape, but rather to go slowly and make it a pleasurable experience for her. *Id.* Talbot's intent was clear throughout his communication: he wanted to have sex with "Ellie's" 12 year-old daughter. While he may also have wanted to have a relationship with "Ellie," this does not negate the evidence of his specific intent to have sexual contact with a 12 year-old child.

When the evidence is viewed in the light most favorable to the State, the evidence established that Talbot took a substantial step towards having sexual contact with a child under the age of 14 when he was well over three years older than the child, and that he took that substantial step with the intent to have sexual contact with a child. The evidence showed that they had a specific plan to meet at a specific location and if all seemed

ok to go back to "Ellie's" residence where the sexual contact would happen that very night. Talbot then drove to the Starbucks, parked his car, and entered the building. From that evidence, any trier of fact could reasonably find that Talbot undertook a substantial step with the intent to have sexual contact with a child. The evidence was sufficient to support his conviction for attempted child molestation in the second degree.

A conviction will be reversed for insufficient evidence only if *no* rational trier of fact could find all the elements established beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Clearly a rational trier of fact could, and in fact did, find all the elements of attempted child molestation in the second degree were proven in Talbot's case. The State presented sufficient evidence to persuade a rational trier of fact of the truth of the allegations. Talbot's conviction should be affirmed.

II. The community custody conditions were properly imposed.

Talbot argues the trial court erred in imposing a community custody condition which prohibits him from possessing or using computers or devices which may access the internet. This condition is directly and reasonably related to Talbot's crime of Attempted Child

Molestation in the Second Degree. The trial court properly imposed this condition and it should be affirmed.

Trial courts may impose crime-related prohibitions while a defendant is on community custody. RCW 9.94A.505(8). A crime-related prohibition is one that directly or reasonably relates to the circumstances of the crime for which the defendant was convicted. RCW 9.94A.030(10); *State v. Kinzle*, 181 Wn.App. 774, 785, 326 P.3d 870, *rev. denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014). A trial court's imposition of a crime-related prohibition is reviewed for an abuse of discretion. *State v. Cordero*, 170 Wn.App. 351, 373, 284 P.3d 773 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In *State v. O'Cain*, 144 Wn.App. 772, 184 P.3d 1262 (2008), the Court on review found access to the internet was *not* crime-related because there was no evidence that the internet played a role in O'Cain's commission of his crime. *O'Cain*, 144 Wn.App. at 775. However, the court inferred that had "internet use contributed in any way to the crime..." that it would be an appropriate crime-related prohibition. The Court specifically reasoned that "[t]his is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual

encounter," thus stating that in a case where internet use had actually contributed to the crime, prohibiting use of or access to the internet would be an appropriate crime-related prohibition. *See id.*

In *State v. Kinzle*, 181 Wn.App. 774, 326 P.3d 870 (2014) the appellate Court upheld the imposition of a community custody condition which prohibited the defendant from dating women with minor children or forming relationships with families who have minor children because the victims of his crimes were children he had come into contact with through relationships with their parents. *Kinzle*, 181 Wn.App. at 785. Thus the condition was reasonably crime-related. *Id.* In *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993) the Supreme Court upheld a condition which prohibited a defendant from possessing a computer after he had been convicted of computer trespass. *Riley*, 121 Wn.2d at 37. There, the prohibition against possessing a computer was found to be crime-related. *Id.*

More notably, in *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015), this Court addressed the propriety of a community custody provision that prohibited a child molester from possessing a computer or any digital media storage device. There, the defendant's conduct included molesting his victim and taking photographs of them. *Irwin*, 191 Wn.App. at 656. The Court on review concluded the trial court properly imposed

the prohibition on Irwin's possession of computers as a "crime-related prohibition" that prohibited conduct that "directly relates to the circumstances of the crime for which the offender has been convicted." *Id.* (quoting RCW 9.94A.030(10)).

As in *Irwin, supra*, there is clear evidence in the record that technology contributed to Talbot's crime. In fact, technology was the mechanism through which Talbot initiated and planned his crime. The relationship between Talbot's crime and the technology the court is prohibiting him from using is strong. This condition is "reasonably related" to the crime Talbot committed. The trial court did not abuse its discretion in imposing this condition.

Talbot also argues that the community custody prohibition unlawfully infringes on his constitutional right to freedom of association under the First Amendment. A "'defendant's constitutional rights during community placement are subject to the infringements authorized by the [Sentencing Reform Act of 1981].'" *In re Pers. Restraint of Waggy*, 111 Wn.App. 511, 517, 45 P.3d 1103 (2002) (alteration in original) (quoting *In re Pers. Restraint of Caudle*, 71 Wn.App. 679, 683, 863 P.2d 570 (1993) (Sweeney, J., concurring)). This court presumes a sentencing condition is constitutional, and Talbot has the burden of proving its unconstitutionality beyond a reasonable doubt. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678

(2008). When imposing crime-related prohibitions that implicate an offender's First Amendment rights, the restrictions must be clear and "reasonably necessary to accomplish essential state needs and public order." *Bahl*, 164 Wn.2d at 757-58. Such conditions must be "sensitively imposed." *Id.* at 757.

The prohibition imposed in Talbot's case is reasonably necessary to accomplish essential state needs and public order. Talbot has made it evident that he is not safe for the children in our community. This includes his online presence. He sought out Craigslist advertisements, responded to one about teaching a young daughter about sex, and then set about planning his molestation of a child whom he accessed via the internet. Prohibiting Talbot from accessing the internet is reasonably necessary to prevent him from seeking out other children to molest or rape. This prohibition legitimately and appropriately furthers the State's probation goals. Though this prohibition may infringe on Talbot's constitutional rights, it is appropriately done in this case as the prohibition is reasonably necessary to keep the children in our community safe from this online predator.

III. The State does not intend to seek a cost bill.

The State does not intend to seek a cost bill in this case and therefore Talbot's argument that this court should prohibit the imposition of appellate costs is moot.

CONCLUSION

Talbot was properly convicted of Attempted Child Molestation in the Second Degree and the trial court imposed appropriate crime-related prohibitions as part of its sentence. The trial court should be affirmed in all respects.

DATED this 21 day of April, 2017.

Respectfully submitted:

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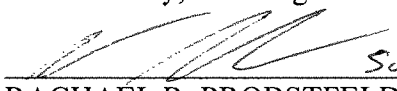
By:  50215 for
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